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THE GREAT DISSENTS OF THE “LONE DISSENTER”

*Justice Jesse W. Carter’s Twenty Tumultuous
Years on the California Supreme Court*

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JUSTICE CARTER, CONTRIBUTORY NEGLIGENCE AND WRONGFUL DEATH: A CALL TO GET RID OF A “BAD LAW WITH BAD RESULTS”

By Michael A. Zamperini*

Introduction and Case Background

Allen Buckley was killed on April 19, 1951 in an accident on a construction site in Southern California.¹ Mr. Buckley was a self-employed contractor who owned two dump trucks but rented cranes and other equipment for his job of furnishing dirt and other materials to constructions sites.² Approximately a month before his death, he entered into a partnership with B.F. McDonald to provide 5,000 yards of dirt for a construction project.³ The partners rented a “drag line crane” from Fred Chadwick under an oral contract.⁴ Part of the contract provided that the partners would “provide an experienced oiler in the operation of the crane and also that Mr. McDonald would operate [the

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1. *Buckley v. Chadwick*, 45 Cal. 2d 183, 187 (1955) (hereinafter “*Buckley*”).

2. *Id.*

3. *Buckley v. Chadwick*, 274 P.2d 673, 675 (Cal. Ct. App. 1954) (hereinafter “*Buckley Appeal*”). No copy of this opinion exists in the official reports of the California Courts of Appeal. The California Rules of Court allow the Supreme Court to “depublish” a Court of Appeal opinion when the Supreme Court grants review or if requested by an interested party. Once the opinion is “depublished” it can no longer be cited, but still exists in the unofficial, regional reporter, here Pacific Reporter. Cal. R. Ct. 8.1105(d)(replacing R. 976 as of Jan. 1, 2007). The Supreme Court’s opinion refers to the partner only as “one McDonald.”

4. See *Buckley*, 45 Cal. 2d at 187 (1955).

crane].” Mr. Chadwick also represented that the crane was in “first class condition.”⁵

On April 19, 1951, the two partners were at a dirt pit. Mr. McDonald was operating the crane. He filled the bucket of the crane with dirt, raised the bucket to the top of the crane boom, swung the boom and its load over the bed of one of the dump trucks, and then lowered the bucket and released it to deposit the dirt into the bed of the truck.⁶ While Mr. McDonald was operating the crane, Mr. Buckley was standing on the running board of the dump truck. Without warning, the boom cable suddenly broke. The boom fell, striking Mr. Buckley on the head and killing him instantly.⁷

Mr. Buckley’s widow, Dorothy, on behalf of herself and their minor son Bruce Allen Buckley, sued Mr. Chadwick in Los Angeles Superior Court. The suit alleged two causes of action: breach of warranty, and negligence in causing the wrongful death of Allen Buckley.⁸

Mr. Chadwick defended by pleading contributory negligence. He alleged that even if he had been negligent in maintaining the crane, any negligence on the part of Mr. Buckley personally, or on the part of any of his agents (Mr. McDonald and the man who was the oiler for the crane) would bar any recovery for wrongful death by Mr. Buckley’s heirs.⁹

Conflicting evidence was introduced at trial. Mr. McDonald testified that as a crane operator for twenty-seven years, he had never experienced a cable break in such a manner. He also testified as to his (and the oiler’s) proper use of the crane.¹⁰ Karl Taroldsen, plaintiffs’ expert witness, expressed the opinion that the cable “was just worn out,” and that such wear could not have been caused within the six days that the partnership had been using the crane.¹¹

Defendant’s experts, however, maintained that the oiler should have checked the cable every day and reported any wear or defect. They also claimed that the

5. *Id.*

6. *See Buckley Appeal*, 274 P.2d at 675.

7. *Id.*

8. *See Buckley*, 45 Cal. 2d at 188. Even though the widow waived her rights to any recovery in favor of the minor son, the suit continued in her name and the published opinions refer to the plural “plaintiffs.” *Id.* at 186. Apparently Mr. McDonald was not sued.

9. *Id.* at 188. Mr. Chadwick had merely pleaded “contributory negligence” and had not specifically pleaded that the alleged negligence of either Mr. McDonald or the oiler could be imputed to Mr. Buckley. While the appellate court acknowledged that plaintiffs could raise the omission of this defense in his answer, that court also decided that plaintiffs had waived their right to raise such an objection in a timely manner, because it was only brought to the court’s attention in plaintiffs’ motion for a new trial. *See Buckley Appeal*, 274 P.2d at 677.

10. *Id.* at 675.

11. *Id.*

end of the cable where the break occurred showed abrasive damage from faulty winding and unwinding. All of this, they claimed resulted in enough damage during the six days that the partnership had the crane to cause the cable to break under the strain.¹² No published opinion indicates that Mr. Buckley himself affirmatively did anything that could be considered contributorily negligent, such as standing too close to the crane, or not properly inspecting it.¹³

Following a trial before Judge Allan W. Ashburn, the jury found in favor of defendant. Plaintiffs appealed and the Court of Appeal affirmed.¹⁴ Plaintiffs then appealed to the California Supreme Court.

The California Supreme Court's majority opinion also affirmed the judgment for the defendant. The opinion addressed the various grounds the plaintiffs urged for appeal, both procedural and substantive, and rejected all of them.¹⁵ Justice Jesse W. Carter and Justice Roger J. Traynor dissented because they believed the trial judge's ruling on plaintiffs' peremptory challenges to the jury members was incorrect and constituted reversible error, without the plaintiffs having to prove they were prejudiced by that ruling.¹⁶ Justice Carter also wrote

12. *Id.* at 675–76.

13. Nor does it seem that any such evidence existed; the defense of “contributory negligence” rested on the negligence of Mr. McDonald and the oiler. Because they were the agents of Mr. Buckley, the trial court ruled that their negligence would be imputed to Mr. Buckley. Thus, at most, Mr. Buckley was “vicariously” rather than “primarily” negligent.

14. See *Buckley Appeal*, 274 P.2d at 673. No challenges were made to the doctrine of contributory negligence. Plaintiffs did contend that the trial court was mistaken in charging the jury about imputed negligence. The Court of Appeal, however, held that “there seems no room for doubt that under all existent California authority, the contributory negligence of the deceased, or those for whom he is responsible, will bar recovery in a wrongful death action. The trial court’s instructions were therefore not erroneous.” *Id.* at 680. Interestingly, the Court of Appeal opinion was authored by Stanley Mosk sitting pro tem. Twenty-one years later, Justice Mosk was a member of the California Supreme Court. He concurred in that Court’s opinion abolishing contributory negligence in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 830–32 (1975), although he dissented in part concerning the Court’s reluctance to use a fair and reasoned approach to applying judgments retroactively or prospectively.

15. These alleged errors included that defendant’s claim of imputed negligence was not pleaded in his answer (*Buckley v. Chadwick*, 45 Cal. 2d 183, 188–89 (1955)), that imputed negligence should not have been applied (*id.* at 189–90, 288 P.2d 12, 15–16), that contributory negligence should not be used as a defense to an action for wrongful death (*id.* at 190–201), and that the trial judge erroneously curtailed plaintiffs’ preemptory challenges in selecting the jury (*id.* at 201–03).

16. “[I]t is obvious that there is no basis in law or fact for the statement of the majority that appellant was required to make an affirmative showing that he was prejudiced as a result of the error committed by the trial court in denying appellant his statutory right to exercise the peremptory challenge....” *Id.* at 207 (Carter, J. dissenting). In fact, Justice Carter

a lone dissent that contributory negligence should not be a defense in an action for wrongful death. On this point, as discussed below, he would ultimately be vindicated.

DISSENT (Concerning Contributory Negligence)

CARTER, J. I dissent.

I cannot agree with the reasoning of the majority that the contributory negligence of a decedent either should, or must be imputed to the heirs of said decedent in a wrongful death action.

The cause of action for wrongful death is wholly statutory; it is entirely separate and distinct from any cause of action which the decedent (had he lived) might have had. (Citations omitted).

The majority opinion, speaking of the three amendments to section 377 of the Code of Civil Procedure, states that "At no time, however, has contributory negligence been abolished as a defense." Contributory negligence was never specifically *mentioned* by the section as a defense—although the appellate courts *assumed* that contributory negligence on the part of the decedent would bar recovery by his heirs or personal representative. The language in the original enactment which could have been said to imply that the decedent's contributory negligence was a defense to an action brought by the personal representative was deleted when section 377 of the Code of Civil Procedure was enacted giving to the heirs also the right to sue. Judge Paul Nourse (42 Cal.L.Rev. 310 et seq.) points out that "Upon the grounds that the cause of action for wrongful death is a new cause of action and separate and distinct from any cause of action that the deceased might have had, it has been uniformly held that the admissions of the decedent against his interests and which might tend to establish his negligence, are not admissible against his heirs in an action brought under Section 377 of the Code of Civil Procedure. (Citations omitted). It seems anomalous to hold that the negligence of the decedent will defeat a cause of action for his death, and to hold that his own admissions may not be used as proof of his negligence.

"The Legislature not having made the decedent's freedom from negligence a condition upon the cause of action which it created, the Courts are without power to graft such conditions upon that cause of action. To do so would be to amend the statute by judicial decree. [Cal. Const., art. III, § 1; (citations omitted).]"

Section 1714 of the Civil Code is the section which contains the defense of contributory negligence. That section provides that "Everyone is responsible,

would dissent a second time, but only on the jury selection issue, when the California Supreme Court later denied a petition for rehearing. *Buckley v. Chadwick*, 45 Cal. 2d 283 (1955).

not only for the result of his wilful acts but also for injuries occasioned to another by his want of ordinary care or skill ... *except so far as the latter has, wilfully or by want of ordinary care, brought the injuries upon himself...*" (Emphasis added.) Judge Nourse notes that "It is clear that there is nothing in the section which allows one, who through negligence has injured another, to escape liability because someone other than the person injured by his negligence contributed to that injury. Yet this is what occurs when a defendant tortfeasor is permitted to plead the negligence of the decedent in an action for wrongful death founded upon Section 377 of the Code of Civil Procedure. It is the *heirs* of the decedent who have suffered pecuniary loss, who are the persons injured by the act of the tortfeasor. Certainly it cannot be said that the widow and minor children of a man killed by the negligence of another have, in the words of Section 1714, 'wilfully or by want of ordinary care brought the injuries' upon themselves." (Emphasis added.)

Judge Nourse notes that the reasons given for the defense of contributory negligence in the decided cases have no application to an action for wrongful death. Quoting from *Fujise v. Los Angeles Ry. Co.*, 12 Cal.App. 207, 211 [107 P. 317], it appears that "In order that contributory negligence shall prevent the recovery of damages for a personal injury, it must appear that the negligence is that of the injured person or of someone over whom he exercised some control.... The reason for the rule which so relieves the defendant from the payment of damages for his negligence where the plaintiff has contributed to the injury by his own negligence, as it is applied in this state, is based upon an argument of convenience, to wit, the impossibility of successfully apportioning the damages between the parties, and not for the reason that the law relieves the defendant from responsibility merely because the injured party has contributed to the result by his own negligence or wrongful act."

Judge Nourse points out that in an action for wrongful death the plaintiffs have brought no injury upon themselves. The fact that the person, whose death gives rise to their cause of action, has by his own negligence, in some degree "however slight" contributed to his own death, is, under the language of the court just quoted, or under the provisions of section 1714 of the Civil Code of no more moment than the contributing negligence of some third person.

An additional distinction between the ordinary tort action and a wrongful death action are the damages recoverable: In the ordinary personal injury action, the plaintiff recovers for medical expenses, pain or suffering, together with compensatory damages; in a wrongful death action, the heirs may recover damages for the injuries they have sustained: loss of support, society, comfort and protection.

Judge Nourse “submits” that the basis for the defense of contributory negligence is entirely lacking in an action for wrongful death even though the cases dealing with actions under section 377 of the Code of Civil Procedure have held that contributory negligence was a defense. He says that if the cases are wrong, this court should not hesitate to overrule them.

I agree with the logic and reasoning set forth by Judge Nourse; I feel that the cases holding contributory negligence a defense in wrongful death actions are wrong and should be overruled and that the error should not be perpetuated as is being done in the instant case....

Comment

Justice Carter’s dissenting opinion focuses on the legislative history of California’s laws concerning negligence and wrongful death and the role of the judiciary in interpreting legislation. It explicitly points out the inequities imposed by allowing a decedent’s imputed contributory negligence to bar a wrongful death suit brought by the decedent’s heirs. As Justice Carter wrote in his dissent, cases applying such a rule are just “wrong and should be overruled.”¹⁷ While this is a particularized application to one distinct cause of action, it rests on the historical development of basic tort liability when conduct falls below a particular standard of care. His opinion channels the development of liability based on a defendant’s negligence, a plaintiff’s concurrent negligence, either primary or imputed, and the tort of wrongful death. The opinion combines these concepts and implicitly foreshadows one of the most important developments in tort law in the twentieth century: the near universal replacement of contributory negligence with comparative negligence.

Negligence as a tort cause of action gradually evolved from a system of simple “strict liability” that the person who caused an injury should pay for it, rather than the person who was injured. Thus, fault was not a prerequisite to a finding of liability.¹⁸ As society moved from a feudal and agrarian model to a commercial enterprise one, the establishment of negligence as a cause of action

17. *Id.* at 206.

18. “[T]he rationalization never proceeded any further than to posit a voluntary act by the defendant ... nothing could save the defendant from civil responsibility ... In other words, there has never been a time, in English law, since ... the early 1500s, when the defendant in [a tort action] was not allowed to appeal to some standard of blame or fault in addition to and beyond the mere question of his act having been voluntary.” John H. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 HARV. L. REV. 383, 443 (1894).

represented a validation of the legal rights of an individual against an impersonal business entity. However, the laissez faire economic paradigm of the 16th and 17th centuries encouraged entrepreneurial businesses, and feared that the prospect of financially crippling liability from negligence suits would adversely affect the entire industrial revolution.¹⁹ Thus, a parallel doctrine soon developed to limit liability based on the plaintiff's own misconduct or negligence. The doctrine, contributory negligence, basically holds that if a plaintiff's negligence combines with the negligence of the defendant, then the plaintiff's cause of action is barred. Thus, although negligent in causing harm to the plaintiff, the defendant has no legal liability. One of the earliest cases using this principle, *Butterfield v. Forrester*,²⁰ involved a defendant who negligently placed a pole across part of a public road. At twilight, the plaintiff on horseback was "riding hard" (fast and violently) and failed to observe and avoid the pole. The plaintiff was injured and sued the defendant for negligence. The opinions of Justice Bayley and Chief Justice Lord Ellenborough are short and concise: a defendant's fault does not excuse a plaintiff from using ordinary care.²¹ Curiously enough, the opinion does not cite any case precedent or statutory authority, but merely takes the position that a delinquent plaintiff cannot recover even if the defendant is at fault.²²

This English doctrine transferred to the American judicial system.²³ In addition to many states having "reception statutes,"²⁴ at least one author has

19. See generally Frank E. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 137 (1958) (pointing out that business liability insurance was virtually unknown up through the 19th Century).

20. King's Bench 1809, 11 East 59.

21. *Id.* at 61.

22. Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946); see also William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 3 (1953) (originally published at 51 Michigan Law Review 465 in 1953 as one of the Thomas M. Cooley lectures delivered by Dean Prosser at the University of Michigan Law School in early 1953).

23. One of the earlier reported cases cited to *Butterfield* as being "very strong" in holding that "to entitle the plaintiff to an action for damages resulting from a nuisance he must show that he acted with common and ordinary caution." *Smith v. Smith*, 19 Mass. (2 Pick.) 621, 624 (1824). In *Smith*, plaintiff claimed damages to his horse because defendant negligently allowed wood to project from his wagon on a public highway that the plaintiff's horse ran into; defendant successfully showed a lack of ordinary care on plaintiff's part because the horse was, once again, being ridden "hard," although this time in the dark; see generally Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1193-98 (1990) (discussing early development of contributory negligence in America).

24. A "reception statute" adopts or receives the common law of England into the state's common law. For example: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." Cal. Civ. Code §22.2 (West 1982).

opined that the doctrine took a firm hold in America in order to help develop mass transportation systems, particularly the rise of the railroads.²⁵

Even if not explicitly explained in the early cases, contributory negligence was justified for several policy reasons, such as 1) plaintiff's act broke the chain of causation created by defendant's negligence; 2) as a "joint tortfeasor," plaintiff had to indemnify defendant; 3) plaintiff's own negligence operated as an assumption of the risk that defendant's negligence would cause harm;²⁶ 4) plaintiff's negligence might put others at risk of harm;²⁷ and 5) a belief that a jury would be "unreliable and irresponsible" and unable to actually apportion fault.²⁸ However, contributory negligence also has a basic moral rationale: to deter careless behavior by accident victims, and allow only those who have been blameless to recover.²⁹

Despite the entrenchment of contributory negligence both in England and America, the judicial system quickly recognized that its "all or nothing" outcome could result in unfair decisions in many circumstances. Thus, in order to ameliorate the harsh result that comes from contributory negligence's complete bar of a plaintiff's action, the common law courts developed a variety of doctrinal exceptions. Some of these exceptions include Last Clear Chance (determining which party had the last in time opportunity to avoid the accident),³⁰ Going to the Rescue (plaintiff's negligence in performing a necessary rescue

25. See Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 152 (1946). Indeed, many cases that established and defined contributory negligence involved suits against railroads. "One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief." *R.R. Co. v. Jones*, 95 U.S. 439, 442 (1877).

26. See generally, Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908).

27. Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L. J. 697, 723 (1978).

28. William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 28–33 (1953); see also Victor E. Schwartz, *Comparative Negligence* § 17.01 (4th ed. 2002). Justice Carter also addressed this justification in his dissent.

29. Near the start of the 20th Century, Justice Holmes wrote for a unanimous Supreme Court (in another railroad case): "(N)othing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him.... It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop." *B & O R.R. v. Goodman*, 275 U.S. 66, 69–70 (1927) (emphasis added).

30. Restatement (Second) of Torts, §§ 479, 480 (1965); *Hoy v. Tornich*, 199 Cal. 545, 553 (1926); see also *Brandelius v. City & County of S.F.*, 47 Cal. 2d 729, 739–40, 746 (1957) (another case where Justice Carter dissented because "I am more confused, after reading the

of person or property is excused unless it rises to the level of being reckless),³¹ and Assessing the Greater Degree of Blame (using corrective justice to weigh a plaintiff's "mere" negligence against a defendant's intentional conduct or "reckless" negligence).³² Ironically, the existence of so many exceptions that involved comparing the actions of both parties was a main force behind the gradual acceptance of comparative negligence. Comparative negligence weighs not only if a party has been negligent, but also in what degree such party contributed to the subject accident.³³ Even if the exceptions to contributory negligence allow a plaintiff to recover even though plaintiff also exercised some "lack of ordinary care," the fact remains³⁴ that with contributory negligence only one party will be victorious: plaintiff or defendant.

In addition to plaintiff's own, personal, affirmative negligence barring a cause of action, the development of the doctrine of vicarious liability placed a further burden on potential plaintiffs. In broad terms, the concept of vicarious liability holds one liable for the negligence of another.³⁵ This "imputed negligence" seeks to hold one business associate liable even though that person did nothing, when the active negligence of another business associate is imputed to the first. Thus, in the same way that traditionally the negligence of a servant is imputed to the master,³⁶ the negligence of one joint venturer (or partner) is imputed to another.³⁷

majority opinion, than ever before as to when the doctrine (of last clear chance) is applicable."); Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).

31. Restatement (Second) of Torts §472 (1965); *Henshaw v. Belyea*, 220 Cal. 458, 461 (1934).

32. Restatement (Second) of Torts, §§481, 482 (1965); *Lovett v. Hitchcock*, 192 Cal. App. 2d 806 (1962); see generally, Kenneth S. Abraham, *The Forms and Functions of Tort Law*, 139-43 (2d ed. 2002).

33. See Restatement (Third) of Torts: Apportionment of Liability, §3 (2000) ("Plaintiff's negligence is defined by the applicable standard for a defendant's negligence. Special ameliorative doctrines for defining plaintiff's negligence are abolished.").

34. They still remain today in jurisdictions that continue to use contributory negligence. See *infra* note 60 and accompanying text.

35. Restatement (Second) of Torts, §§462-96 (1965); *Bryant v. Pac. Elec. Ry.*, 174 Cal. 737, 742 (1917) (approving of *Nonn v. Chi. City Ry.*, 232 Ill. 378 (1908)).

36. A concept originating from feudal times where the serf, as opposed to the freedman, had no legal identity apart from the master. See John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 330-36 (1894).

37. A joint venture is a one-time business relationship (as opposed to an on-going partnership or other business association) where each joint venturer has the right to control the other. Restatement (Second) of Torts §491 (1965); *Meyers v. S. Pac. Co.*, 63 Cal. App. 164, 169-70 (1923); see also W. Page Keeton, *Imputed Contributory Negligence*, 13 TEX. L.

The negligence of both parties and imputed negligence were all common law instead of statutory concepts for determining liability. However, these concepts found their way into the statutory cause of action for wrongful death. The nation's legislatures passed laws that allowed suit for wrongful death by heirs when the defendant's wrongful conduct results in a decedent's ultimate injury. No such cause of action existed at common law.³⁸ The reason for this situation is that one's causes of action were considered personal and expired on death, as well as a notion that death should not be the prompt for an heir's monetary recovery (i.e., "profiting from death").³⁹ However, wrongful death statutes have been passed in all jurisdictions. They allow a suit, brought by relatives or other statutorily designated persons who claim that the defendant's intentional or negligent (i.e., "wrongful") acts resulted in the death of the decedent.

California has had some form of a wrongful death statute since 1862.⁴⁰ The current wrongful death statute, similar to the one in existence in 1955, provides as follows: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons [listed heirs] or by the decedent's personal representative on their behalf[.]"⁴¹

In addition, the statutory scheme specifies the types of damages the decedent's heirs can claim,⁴² and thus wrongful death is a new cause of action that, while based on the death of a decedent, is not necessarily the decedent's claim for injuries against the defendant.⁴³

Even though wrongful death is a statutory cause of action, California courts have applied common law concepts of proof and liability, thus grafting negli-

REV. 161, 163–69 (1935); W.D. Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence*, 6 NOTRE DAME L. REV. 172 (1931).

38. *Clark v. Goodwin*, 170 Cal. 527, 528 (1915).

39. See generally, Helmuth Carlyle Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TULANE L. REV. 201 (1932); *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 303–06 (1931) (discussing the historical antecedents of wrongful death back to the Roman Empire).

40. *Kramer v. S.F. Mkt. St. R.R.*, 25 Cal. 434, 435 (1864).

41. CAL. CIV. PROC. CODE § 377.60 (West 2004).

42. For example, in California, "damages may be awarded that, under all the circumstances of the case, may be just, but may not include (punitive damages or damages for the heirs' pain and suffering)." Cal. Civ. Proc. Code § 377.61 (West 2004).

43. California also allows the joinder of the heirs' wrongful death action with any action that the decedent might have had against the defendant. CAL. CIV. PROC. CODE § 377.62 (West 2004).

gence (contributory and imputed) principles to the cause of action.⁴⁴ The California wrongful death statute contains nothing about the acts or negligence of the decedent as a defense,⁴⁵ and that omission has been interpreted to mean that the Legislature “left the courts of this State free to interpret and apply the statute in the light of the common law...”⁴⁶

Therefore, relying on that standard of interpretation, the majority held that if a decedent was personally or imputedly negligent in contributing to the action that led to death, such negligence would bar a survivor’s cause of action for wrongful death.⁴⁷

Thus, when Mr. Buckley’s survivors’ appeal was accepted by the California Supreme Court, while no evidence existed that Mr. Buckley was personally negligent, they faced precedent holding that if Mr. Buckley’s partner, Mr. McDon-

44. Another disagreement between the majority and Justice Carter concerned how to interpret California’s general negligence statute in relation to the wrongful death statute. The negligence statute provides as follows: “Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.” CAL. CIV. CODE § 1714(a) (West Supp. 2007) (The same statute was in effect in 1955 except it contained no “subsection (a)” and the first word “everyone” was spelled “every one.”). The majority opined that the statute merely codified existing common law and did not limit the application of contributory negligence to negligence cases or preclude its application to wrongful death ones. *Buckley v. Chadwick*, 45 Cal. 2d 183, 192–93 (1955). Justice Carter, however, believed that the statute did limit contributory negligence to negligence, as opposed to wrongful death cases, because the plaintiffs/heirs in a wrongful death action have done nothing negligent. *Id.* at 205–06. The same argument would find its way back to the California Supreme Court when it adopted comparative negligence; the Court held that Section 1714 merely codified existing common law without precluding further judicial development, and that the language of the statute could easily be interpreted by the judiciary to provide for comparative negligence. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 813–23 (1975).

45. In contrast, for example, the Missouri wrongful death statutory scheme specifically provides as follows: “(T)he defendant may plead and prove as a defense any defense which the defendant would have had against the deceased in an action based upon the same act, ... which caused the death of the deceased, and which action for damages the deceased would have been entitled to bring had death not ensued.” Mo. Rev. Stat. § 537.085 (West 2000).

46. See *Buckley*, 45 Cal. 2d at 192.

47. Restatement (Second) of Torts § 494 (1965) (citing the majority opinion in *Buckley v. Chadwick*, 45 Cal. 2d 183 (1955) as authority); Fleming James, Jr., *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 357–58 (1954). Indeed, this use of negligence principles in a wrongful death action survived the demise of contributory negligence, so that now the negligence of the decedent can block or reduce a recovery under comparative negligence. See, e.g., *Wiley v. S. Pac. Transp. Co.*, 220 Cal. App. 3d 177, 194 (1990).

ald, or the “oiler” the partners employed, were negligent, then their negligence could be imputed to Mr. Buckley and thus bar his surviving family from collecting in a suit for wrongful death. The majority opinion extensively discusses the history of California’s wrongful death statute and avers that California cases “consistently and unswervingly followed the rule” that contributory negligence of the decedent is a valid defense in a wrongful death action.⁴⁸ The opinion also points out that as of 1955, 41 other states followed the same rule.⁴⁹

In many respects, the majority opinion straight-forwardly marshals precedent and then follows it to affirm the trial court’s verdict for the defendant. However, Justice Carter took a broader view of the entire situation and relied on a recent, short law review article by Judge Paul Nourse of the Los Angeles Superior Court.⁵⁰ In that article, Judge Nourse pointed out that because a cause of action for wrongful death is totally statutory, and arises on behalf of the heirs from the death of the decedent, it is distinct from any cause of action that the decedent might have had against the defendant.⁵¹ Justice Carter built on this concept, pointing out that the damages recoverable in wrongful death are vastly different from the damages recoverable in negligence. In negligence, plaintiffs recover for their own pain, suffering and medical expenses; in wrongful death, the survivors are compensated for their injuries arising from being deprived of the support, society and comfort of the decedent. Those latter damages occur no matter what activity the decedent may have engaged in that could have contributed to death.⁵²

However, Justice Carter did more than just disagree with the majority about the appropriateness of allowing a defense of contributory negligence in a wrongful death action. While he criticized the use of common law contributory negligence principles in a statutory cause of action for wrongful death, he also underscored the basic unfairness of contributory negligence itself as a legal concept. By quoting Judge Nourse (who was himself quoting a 1909 case),⁵³ Justice Carter pointed out that unquestioningly following precedent results in continuing a bad law and bad results. This is especially so when the reason given for the law (contributory negligence as a defense in wrongful death) is

48. See *Buckley*, 45 Cal. 2d at 199.

49. *Id.* at 200 n.5.

50. Paul Nourse, *Is Contributory Negligence of Deceased a Defense to a Wrongful Death Action?*, 42 CAL. L. REV. 310 (1954). By 1955, when Justice Carter quoted this article at length, Paul Nourse had been elevated to the California Court of Appeal, First District.

51. *Id.* at 311.

52. See *Buckley*, 45 Cal. 2d at 206.

53. Paul Nourse, *Is Contributory Negligence of Deceased a Defense to a Wrongful Death Action?*, 42 CAL. L. REV. 310, 312–13 (1954) (quoting *Fujise v. L.A. Ry.*, 12 Cal. App. 207 (1909)).

only for the administrative convenience of avoiding the difficult task of apportioning liability.⁵⁴ Such an argument foreshadows a way to treat both innocent heirs and negligent defendants in a fair manner: keep the basic rules but change contributory negligence to comparative negligence.

Compared to the harsh “all or nothing” result that contributory negligence causes, even if several ameliorative doctrines allowed a plaintiff to recover,⁵⁵ the doctrine of comparative negligence presents a clear alternative.⁵⁶ In simplest terms, comparative negligence seeks to “compare” and apportion liability of all parties to an incident and only holds each liable for a “comparative portion.” Comparative negligence in most instances shifts the focus of a tort case from liability to damages. As a result, a plaintiff’s negligence might not bar an award for damages, but that same negligence could reduce any recovery by the percentage of fault attributed to the plaintiff.⁵⁷

In 1955, at the time its Supreme Court decided *Buckley v. Chadwick*, California followed the contributory negligence rule, but several states (and some federal laws)⁵⁸ had already adopted comparative principles to apportion damages and allow an injured plaintiff to recover something, even if the incident

54. See *Buckley*, 45 Cal. 2d at 206.

55. See *supra* notes 32–36 and accompanying text. “No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, through no fault of ours, remains in our law and gives us no alternative other than to hold that defendant is entitled to judgment...” *Haeg v. Sprague, Warner & Co.*, 202 Minn. 425, 429 (1938).

56. See generally, William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1 (1953); see also Richard W. Wright, *Allocating Liability among Multiple Responsible Causes: a Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1156–58 (1988).

57. W. Page Keeton, *Prosser & Keeton on Torts* §67 (5th ed. 1984); 6 B.E. Witkin, *Summary of California Law*, Torts §1327 (10th ed. 2005). While Prosser & Keeton describe variations on comparative negligence as “modified” and “slight-gross,” the “pure” form of comparative negligence eventually adopted in California merely compares the negligence of plaintiff and all defendants and assigns a percentage of liability or fault to all. Thus if a plaintiff on horseback is injured when the horse trips over a pole negligently left by defendant, then the trier of fact can combine the percentage of liability for all parties that had a part in injuring the plaintiff and base the judgment on that: if a defendant is 40% liable for leaving the pole in the road, and the plaintiff is 60% liable for not maintaining a proper look-out or riding hard, then the plaintiff can only recover 40% of the total damages from defendant, and is personally responsible for the remaining 60%.

58. The doctrine had long been used in the federal system both as common law, *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170, 177–78 (1854) (in admiralty cases to parallel British admiralty law), and statutorily since at least 1908 for cases brought by railroad workers under the Federal Employers’ Liability Act, 45 U.S.C.A. § 53 (West 1986).

was partially plaintiff's fault.⁵⁹ This near-universal switch to comparative principles⁶⁰ gradually came from a basic recognition of fairness, since contributory negligence "places upon one party the entire burden of a loss for which two are, by hypothesis, responsible."⁶¹

California would take another 20 years to remedy the "all or nothing" result of contributory negligence. In *Li v. Yellow Cab Company of California*⁶² the California Supreme Court by judicial decision, instead of the Legislature by statute, abandoned contributory negligence,⁶³ for reasons of "logic, practical experience, and fundamental justice"⁶⁴ in favor of comparative negligence, "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."⁶⁵

59. See William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1 (1953). For a comprehensive history of the adoption of comparative negligence by courts or statutes, see Thomas R. Trenkner, Annotation, *Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally*, 78 A.L.R.3d 339 (1977 & Supp. 2006).

60. As of the end of 2006, contributory negligence as a defense survives in only 4 states: Alabama ("[T]he majority of this Court, for various reasons, has decided that we should not abandon the doctrine of contributory negligence, which has been the law in Alabama for approximately 162 years." *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1333 (1993)), Maryland (*Hardesty v. Am. Seating Co.*, 194 F. Supp. 2d 447, 450 (D. Md. 2002)), North Carolina (*Lashlee v. White Consol. Indus.*, 144 N.C. App. 684, 690 (2001)), and Virginia (*Jenkins v. Pyles*, 269 Va. 383, 388–89 (2005)). Tennessee was the most recent state to switch from contributory to comparative negligence. *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

61. W. Page Keeton, *Prosser & Keeton on Torts* §67 (5th ed. 1984). Dean Prosser's seminal law review article on comparative negligence concludes: "No effort has been made in these pages to argue the desirability of the division of damages in contributory negligence cases. It speaks for itself, and the question always has been one of feasibility rather than of justice." William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 37 (1953). See also Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986) (arguing that instead of just an intuitive fairness reason, comparative negligence can be justified under an efficient economic analysis). On a related note, one exhaustive survey found that the switch from contributory negligence to comparative negligence produced no clogged trial dockets or delayed trials, did not increase potential litigation, promoted pre-trial settlement, and resulted in plaintiffs winning "a higher proportion of the verdicts, but not larger ones." Maurice Rosenberg, *Comparative Negligence in Arkansas: a "Before and After" Survey*, 13 ARK. L. REV. 89, 108 (1959).

62. *Li v. Yellow Cab Co of C.A.*, 13 Cal. 3d 804 (1975).

63. *Id.* at 862 (citing *Buckley v. Chadwick* among other authorities) ("[T]he long-standing principle that one should not recover from another for damages brought upon oneself ... has been the law of this state from its beginning").

64. *Id.* at 864.

65. *Id.*

Buckley v. Chadwick would probably be decided in a different way today. Imputed negligence and the use of decedent's own actions as a defense in a suit for wrongful death are still valid concepts.⁶⁶ However, comparative negligence would move the focus of the case to allocate responsibility and, assuming they could prove some negligence by defendant, thus allow the heirs to recover something for the loss of the decedent, even if that recovery is diminished by the vicarious negligence of a third party imputed to the decedent.⁶⁷

All of these basic tort concepts, defendant's negligence, imputed negligence from a third party, plaintiff's negligence (whether contributory or comparative), and the role all play in wrongful death cases are woven together in Justice Carter's dissent. While on this issue he was "the lone dissenter," half a century later he is truly the voice of the majority.

66. "[P]rinciples of comparative fault ... support an apportionment of liability among those responsible for the loss, including the decedent, whether it be for personal injury or wrongful death." *Horwich v. Superior Court*, 21 Cal. 4th 272 (1999).

67. Similar to Justice Carter attacking the use of decedent's contributory negligence in wrongful death cases, using comparative negligence in wrongful death is also not without its critics. The arguments use the same rationales: the harm to the plaintiffs/heirs is distinct from the harm to the decedent, and the plaintiffs/heirs engaged in no tortuous conduct. See Kevin John Marrinan, Comment, *Wrongful Death Recoveries in California: Is the Decedent's Negligence a Defense after Li?*, 11 PAC. L. J. 775 (1980) (discussing the *Buckley* decision and Justice Carter's dissent).